

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-949

EVELYN LOWITT,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

**On Petition for Writ of Certiorari to the Superior Court
of New Jersey, Appellate Division**

BRIEF IN OPPOSITION

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Opinions Below

The New Jersey Supreme Court's order denying petitioner's petition for certification appears in petitioner's appendix, page 5. The opinion of the Superior Court of New Jersey, Appellate Division, not reported, appears in petitioner's appendix, pages 1 to 4. The text of the Appel-

late Division's opinion refers to a supplemental point raised by petitioner before the Appellate Division, but not before this Court. As to the issue raised in the instant petition, the Appellate Division summarily affirmed, pursuant to New Jersey R. 2:11-3(e)(2).

Statutes and Rules Involved

N.J.S.A. 2A:113-1. Murder

If any person, in committing or attempting to commit arson, burglary, kidnapping, rape, robbery, sodomy or any unlawful act against the peace of this State, of which the probable consequences may be bloodshed, kills another, or if the death of anyone ensues from the committing or attempting to commit any such crime or act; or if any person kills a judge, magistrate, sheriff, constable or other officer of justice, either civil or criminal, of this State, or a marshal or other officer of justice, either civil or criminal, of the United States, in the execution of his office or duty, or kills any of his assistants, whether specially called to his aid or not, endeavoring to preserve the peace or apprehend a criminal, knowing the authority of such assistant, or kills a private person endeavoring to suppress an affray, or to apprehend a criminal, knowing the intention with which such private person interposes, then such person so killing is guilty of murder.

N.J.S.A. 2A:113-2. Degrees of murder; designation in verdict

Murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which is com-

mitted in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, or which is perpetrated in the course or for the purpose of resisting, avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, or murder of a police or other law enforcement officer acting in the execution of his duty or of a person assisting any such officer so acting, is murder in the first degree. Any other kind of murder is murder in the second degree. A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree.

N.J.S.A. 2A:98-1. Conspiracy

Any 2 or more persons who conspire:

- a. To commit a crime; or
- b. Falsely and maliciously to indict another for a crime, or to procure another to be charged or arrested; or
- c. Falsely to institute and maintain any suit; or
- d. To cheat and defraud a person of any property by any means which are in themselves criminal; or
- e. To cheat and defraud a person of any property by any means which, if executed, would amount to a cheat; or
- f. To obtain money by false pretenses; or
- g. To conceal or spread any contagious disease; or
- h. To commit any act for the perversion of obstruction of justice or the due administration of the laws—

Are guilty of a conspiracy and each shall be punished, in the case of a conspiracy to commit a crime involving the possession, sale or use of narcotic drugs, as for a high misdemeanor and in all other cases, as for a misdemeanor.

N.J.S.A. 2:81-20. Witness from another state summoned to testify in this state

If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and \$5 for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period

mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

New Jersey Rule 2:11-3 (e) (2)

Criminal Appeals. When in a criminal appeal the Appellate Division determines that some or all of the issues raised by the defendant are clearly without merit, the court may affirm by an opinion which, as to such issues, specifies them and quotes this rule and paragraph.

New Jersey Rule 3:13-3 (a) (7)

Discovery by the Defendant. Upon written request by the defendant, the prosecuting attorney shall permit defendant to inspect and copy or photograph any relevant names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information including a designation by the prosecuting attorney as to which of those persons he *may* call as witnesses.

New Jersey Evidence Rule 63(4). Spontaneous and contemporaneous statements

A statement is admissible if it was made (a) while the declarant was perceiving an event or condition which the statement narrates, describes or explains, or (b) while the declarant was under the stress of a nervous excitement caused by such perception, in reasonable proximity to the event, and without opportunity to deliberate or fabricate.

Statement of the Case

Monmouth County Indictment No. 1510-75, filed on June 13, 1976, charged petitioner herein, Evelyn Lowitt, with: count one, the murder of Oscar Lowitt, N.J.S.A. 2A:113-1 and 2, and count two, conspiracy to murder, N.J.S.A. 2A:98-10. Defendant was tried before the Honorable Louis R. Aikins, J.S.C., and a jury on November 17 through 24, 1976, and was found guilty of first degree murder and conspiracy.

The State's proofs were that defendant hired two race-track grooms, O'Neal Davis and Sylvester Cholmondeley to kill her husband. Vanessa Williams, a friend of Davis', was also involved. Mrs. Lowitt resented her husband's maintenance of a girlfriend in Florida.

The actual shooting was done by Cholmondeley, in the presence of Davis and Williams, Davis accepted some of the payment and he and Williams helped to set up the killing.

O'Neal Davis pleaded guilty to conspiracy to commit murder. He testified for the State at the trials of Sylvester Cholmondeley, Vanessa Williams and petitioner herein, Evelyn Lowitt, in return for the dismissal of the murder charge against him.

A jockey named Manuel Cedeno had witnessed the shooting, and he gave a statement including a description of the perpetrator to police at the scene. Mr. Cedeno testified at the trial of Cholmondeley, who was convicted on charges similar to those against petitioner. Cedeno's name had been given to defense counsel in discovery as a *potential* state witness, pursuant to New Jersey Rule 3:13-3(a)(7). The State in the instant case did not call Cedeno as a witness, and the defense on November 18, 1976, began

an attempt to secure Cedeno's presence by use of N.J.S.A. 2A:81-20.* After the State had rested its case and after the defense had called all of its available witnesses, the defense moved for a continuance in order to secure Cedeno's presence in court (transcript of November 23, 1976). In Florida, Cedeno had yet to be served with an order compelling his appearance and testimony at the New Jersey trial. Defense counsel argued that a Broward County deputy sheriff had assured him that Cedeno would be served with the order no later than that evening, November 23, 1976.

Defense counsel contented that Cedeno was a necessary and material witness because a statement he gave to the police describing the triggerman allegedly did not fit the description of Cholmondeley. The defense speculated that O'Neal Davis may have been the triggerman, and they wanted Cedeno in court to support their theory, thus attacking O'Neal Davis's credibility. Cedeno also claimed to have heard the victim say that he knew the killer. The trial judge had initially signed a certification, pursuant to the interstate act, which stated that Cedeno was a material witness. This certification was made by the court on the basis of a defense representation that Cedeno was material. The court had not inquired into the reasoning behind counsel's representation at the time he signed the certification (1R10-4 to 25).** Once the defense reasoning was known to the court, the judge ruled that he had erred in describing Cedeno as a material witness.

* N.J.S.A. 2A:81-19 *et seq.* known as the "Uniform Act to Secure the attendance of Witnesses from within or without a state in criminal proceedings" contemplates, by its terms, only the production of witnesses who are "material."

** 1R refers to the record below, transcript of November 23, 1976,

The judge ruled that Cedenó was not a material witness. His testimony would be used collaterally to affect credibility and not directly to exculpate. Even though the defense argued that the testimony could go to Davis's motive for falsely testifying, the court felt that in either event Davis was a principal and in either case he had immunity from prosecution (1R26-4 to 1R27-21). The judge also noted that in Cholmondeley's trial when Cedenó testified, he identified Cholmondeley as the gunman even though O'Neal Davis was standing next to Cholmondeley in court (1R17-6 to 18). So, the chance of affecting O'Neal Davis's credibility was very remote.

Although Manuel Cedenó did not testify at petitioner's trial, Officer Donald Pignitore, who had earlier testified concerning his appearance at the motel shortly after the shooting and his on-the-scene conversation with Cedenó (R78-15 to R79-24), was recalled to the witness stand. He told the jury that Cedenó told him that he saw the shooting, and he repeated Cedenó's description of the shooting, the killer, and the getaway (R979-10 to R983-24). The court allowed this testimony under the hearsay exception of New Jersey Evidence R. 63 (4).

Petitioner contends that besides attacking the credibility of O'Neal Davis she hoped to establish through Manuel Cedenó that the victim was killed during a robbery. A careful perusal of the transcript for the motion for adjournment fails to reveal any such trial strategy. *Upon questioning, defense counsel conceded to the court that Cedenó's testimony could not directly exculpate by showing petitioner was not a conspirator or did not cause the trigger to be pulled* (R14-1 to R15-18). There was no allegation that Cedenó would or could testify as to having witnessed a robbery. The robbery defense was to be developed by petitioner's testimony and by the discrediting of the state's testimony. The court in ruling on the motion

for adjournment said, ". . . [W]hat has come before this Court by way of what the testimony of Mr. Manuel Cedenó would be is basically, possibility of contradiction of O'Neal Davis as to whether he was the triggerman or not. Nothing that has been proffered by way of possible testimony of Manuel Cedenó could establish that they were in the process of a robbery." (1R43-11 to 18).

The trial judge additionally ruled that the defense had not been diligent in securing Cedenó's presence in court, because it should have made application well prior to the beginning of trial (1R54-8 to 22). Petitioner states that she "fully expected" Cedenó to be produced by the State. The State cannot be held accountable for such an expectation. The prosecutor was in fact surprised that the defense would want to call Cedenó as a witness (R584-1 to 2). No one associated with the defense had ever interviewed Cedenó (1R4-5 to 8) and only during trial had the full transcript of Cedenó's prior testimony been ordered by the defense (1R3-8 to 25).

The judgment of conviction for murder was entered on November 24, 1976, and petitioner was sentenced to life imprisonment at the New Jersey Correctional Institution for Women at Clinton. The judgment of conviction for conspiracy was entered on December 17, 1976, and petitioner was given a consecutive term of not less than two nor more than three years at the same institution. A motion for new trial was heard and denied on January 7, 1976. The Appellate Division affirmed petitioner's convictions on June 19, 1978, and the New Jersey Supreme Court denied her petition for certification on September 19, 1978. Petitioner was admitted to bail pending the disposition of her petition for certification and her bail has been continued pending the disposition of the instant Petition.

REASONS FOR DENYING CERTIORARI

POINT I

The trial court's refusal to adjourn the trial pending the production in court of Manuel Cedenó was proper.

The fact that Cedenó was not a material witness in this case compels the conclusion that petitioner was denied no constitutional rights by his absence. As noted, N.J.S.A. 2A:81-20 provides for the production only of "material" witnesses. Petitioner does not contest the constitutionality of the statute. Indeed, the statute authorizes precisely the remedy which petitioner claims to seek, *i.e.*, the production of a material witness. The statute is thus in accord with this Court's holdings in *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920 (1967) and *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038 (1973). However, since Manuel Cedenó is not a material witness, petitioner does not come within the purview of the statute or this Court's prior holdings.

It is also clear that the denial of a continuance is not a constitutional issue. Rather, it is a matter of State practice, and the trial court's discretion. In New Jersey, the grant or denial of a continuance is

a matter exclusively within the province and sound discretion of the trial judge, and should not be upset unless it appears from the record that the defendant suffered manifest wrong or injury. *State v. Lamb*, 125 N.J. Super. 209, 213, 310 A.2d 102, 104 (App. Div. 1973)

Accord, *State v. Smith*, 87 N.J. Super. 98, 105, 208 A.2d 171, 175 (App. Div. 1965). Moreover, it has been held that

a criminal defendant will not be entitled to a continuance for the purpose of obtaining the appearance of a defense witness unless it is established not only that defendant will be prejudiced by the witness's nonappearance, but also that a determined effort has been made to have the witness appear. *State v. Kyles*, 132 N.J. Super. 397, 401-403, 334 A.2d 44, 47 (App. Div. 1975); *State v. Smith*, 66 N.J. Super. 465, 468, 169 A.2d 482, 484 (App. Div. 1961), *aff'd* 36 N.J. 307, 177 A.2d 561 (1962).

The State submits that in the instant case under all the circumstances the trial court fairly and soundly exercised its discretion not to grant a continuance. The witness was not material to the defense. The witness was not within the jurisdiction of the court, had not been served with an order to show cause, and was not likely to come shortly within the court's jurisdiction. And, the defense had not been diligent prior to trial in trying to secure the witness's presence.

The reasonableness of the trial court's ruling is not altered by constitutional considerations.

A defendant does have the right to present a defense. In *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920 (1967) this Court held that the Sixth Amendment right of an accused to have compulsory process for obtaining defense witnesses was applicable to the states through the Due Process Clause of the Fourteenth Amendment. The *Washington* case invalidated two Texas witness statutes which prohibited all persons charged or convicted as co-participants in the same crime from testifying for one another, regardless of the relevancy and materiality of their proffered testimony. The Court stated that the right of an accused to have compulsory process will be deemed violated when a state rule arbitrarily prevents whole categories of defense witnesses from testifying on the basis of irrational pre-classification. *Id.* at 22, 23, 87 S.Ct. at 1925.

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973) reaffirmed this right of compulsory process and explicitly said that it was not fashioning a new principle of constitutional law or imposing a new evidentiary rule on the state courts. In *Chambers* a man, McDonald, issued a confession which was transcribed, signed, and witnessed, stating that he and not Chambers had shot a policeman to death. McDonald then repudiated his sworn confession at a preliminary hearing. The written confession was admitted at Chambers' trial when the defense called McDonald to the witness stand. The trial court refused, however, to let Chambers' attorney directly challenge McDonald's recantation of the confession (through the testimony of witnesses to whom McDonald had confessed previously) because state evidence rules would not allow a party to impeach his own witness. The *Chambers* Court held that due process of law demands that a state prisoner be allowed to present witnesses in his own defense when there exists "persuasive assurances of trustworthiness" in the proffered testimony and said testimony is "critical" to the defense. The *Chambers* Court would not allow the hearsay rule to defeat the ends of justice for which it was created.

Nothing in *Washington* or *Chambers* suggests that the trial court in the case at bar acted against constitutional imperatives. Neither case addressed itself to a situation where the witness was not material and not within the jurisdiction of the court. Even *People v. Foy*, 32 N.Y.2d 473, 299 N.E.2d 664 (1973), cited by petitioner supports the State's position.

In *Foy* the court reiterated three standards for determining motions for trial continuances to obtain the presence of witnesses: ". . . (1) that the witness is really material and appears to the court to be so; (2) that the party who applies has been guilty of no neglect; (3) that

the witness can be had at the time to which the trial is deferred." *Id.* at 475, 299 N.E.2d at 666. Noting that an adjournment request is addressed to the sound discretion of the court, the *Foy* court said that only when the delay is requested to insure a fundamental right should it be granted liberally. It cautioned that it was not creating a mechanical rule. "Nor should the court be required to permit the prosecution to lapse pending the return of a witness from a foreign jurisdiction, or a fugitive hide-a-way . . . But when the witness is identified to the court, and is to be found within the jurisdiction, a request for a short adjournment after a showing of some diligence and good faith should not be denied because of possible inconvenience to the court and others." *Id.* at 477, 299 N.E.2d at 668.

Obviously petitioner in the instant case fails to meet any of the *Foy* criteria. Instead of a short one-day delay as in *Foy*, petitioner here requested at least 2 trial days, creating a minimal lapse of five days before the resumption of trial because of the holiday and weekend. Moreover, there was no guarantee that the witness would have appeared at that time. Petitioner had been guilty of pre-trial neglect in not attempting to secure Cedeno as a witness. Moreover, Cedeno's testimony would not have been material, unlike the situation in *Foy* where the witness was an alibi witness and held the key to the defense itself. Finally, petitioner here was asking for "the prosecution to lapse pending the return of a witness from a foreign jurisdiction," which practice was specifically disapproved in *Foy*.

On the facts of the case at bar, no constitutional issues are presented.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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